

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KEITH LY,

Plaintiff,

CASE NO. C16-1563-RSM-MAT

V.

DEPARTMENT OF HEALTH, STATE OF  
WASHINGTON, et al.,

### Defendants.

## REPORT AND RECOMMENDATION

## **INTRODUCTION**

Plaintiff Keith Ly, proceeding *pro se* and *in forma pauperis*, filed a complaint pursuant to numerous federal and state statutes, including, *inter alia*, 42 U.S.C. § 1983, Titles VII and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2(a)(1), 2000d, and 42 U.S.C. § 1985. Plaintiff was convicted in this Court on ten felony counts, *United States v. Ly.*, CR 13-0157-MJP, and is currently confined at the Federal Correctional Institution in Sheridan, Oregon.

Plaintiff names as defendants in the current lawsuit the Washington Department of Health (DOH), the Washington State Board of Osteopathic Medicine and Surgery (“Board”), current and/or former Board members Blake Maresh and John G. Finch, Jr., DOH employees Kelly Penders, Kristi Cholski, and “Jill Does 1-3”, Drug Enforcement Agency Diversion Investigator

**REPORT AND RECOMMENDATION**  
**PAGE - 1**

1 Estevan Sanchez, Washington State Attorney General Bob Ferguson, and Washington State  
2 Assistant Attorney General Thomas F. Graham. He cites as the “Related Master Case” a  
3 proceeding before the Board in which his license to practice as an osteopathic physician and  
4 surgeon in the State of Washington was suspended. *See In the Matter of Keith Ky Ly*, License  
5 No. DO.OP.00001670, Master Case No. M2013-370.

6 The Court has now reviewed and considered the proposed complaint. For the reasons set  
7 forth below, the Court recommends this case be DISMISSED.

8 DISCUSSION

9 As noted above, the claims raised in this case relate to an underlying state administrative  
10 proceeding suspending plaintiff’s license to practice as an osteopathic physician and surgeon.  
11 Plaintiff alleges defendants discriminatorily targeted him based on his race and in a number of  
12 other respects acted unlawfully and in violation of his constitutional and statutory rights. (*See*  
13 Dkt. 1 and Dkt. 4-1.) He points to 28 U.S.C. § 1367 (providing for supplemental jurisdiction  
14 over claims related to those over which this Court has original jurisdiction), Federal Rule of Civil  
15 Procedure 24 (providing for intervention in a federal district court case), 42 U.S.C. § 1331  
16 (federal question jurisdiction), 28 U.S.C. § 1442 (allowing for the United States, or its agencies  
17 or officers, to remove actions to this Court), and 42 U.S.C. § 11112 (“Standards for professional  
18 review actions”), as supporting the Court’s ability to assume jurisdiction and/or intervene in this  
19 matter. Plaintiff requests as relief an order restraining the implementation of the administrative  
20 order suspending his license and dismissing the administrative proceedings or, in the alternative,  
21 a review of the issues in order to determine whether the ALJ abused his discretion and an order  
22 for a shorter license suspension term to run concurrently with his criminal case sentence. (*See*  
23 *also* Dkt. 4-1 at 4.) The Court, however, finds this case subject to dismissal.

1 Plaintiff's complaint and attached exhibits show that the state proceedings against him  
2 remain ongoing. (*See* Dkt. 1-1 at 1-6 (Board Findings and Fact and Conclusions of Law and  
3 Final Order suspending plaintiff's medical license on July 25, 2016); *id.* at 7-14 (documents  
4 relating to plaintiff's August 5, 2016 reconsideration request, including September 1, 2016  
5 response from Board and September 5, 2016 email from plaintiff's counsel advising him of the  
6 RCW limiting his appeal of the administrative decision to a Washington State superior court); *id.*  
7 at 25-31 (summons filed by plaintiff in Snohomish County Superior District Court in June 2016);  
8 and *id.* at 33 (September 22, 2016 email to plaintiff from counsel indicating request for  
9 reconsideration denied on that day and advising plaintiff "[t]he time now starts for purposes of  
10 filing any appeal of the rulings by the DOH panel.")) A search of state court filings confirms the  
11 ongoing nature of the state proceedings, including one or more appeals of the administrative  
12 decision recently filed by plaintiff in state superior courts. *See* <https://odysseyportal.courts.wa.gov/odyportal> (petition for judicial review of administrative law proceeding filed in Snohomish  
13 County, *Ly v. State of Washington, et al.*, 16-2-15383-31, and Thurston County, *Ly v. State*  
14 *Health*, 16-2-04398-34, on June 16, 2016 and October 31, 2016, respectively) (both cases active  
15 as of November 3, 2016).

17 Generally, the federal courts will not intervene in pending state proceedings absent  
18 extraordinary circumstances where the danger of irreparable harm is both great and immediate.  
19 *See Younger v. Harris*, 401 U.S. 37, 53–54 (1971). “*Younger* abstention requires federal courts  
20 to abstain from hearing claims for equitable relief as long as the state proceedings are ongoing,  
21 implicate important state interests, and provide an adequate opportunity to raise federal  
22 questions.” *Buckwalter v. Nev. Bd. of Med. Exam’rs*, 678 F.3d 737, 747 (9th Cir. 2012). *See also*  
23 *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*,

1 546 F.3d 1087, 1092 (9th Cir. 2008) (fourth *Younger* factor considers whether “the federal court  
2 action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere  
3 with the state proceeding in a way that *Younger* disapproves.”)

4       The Court is required to invoke the *Younger* abstention doctrine in this case because (1) a  
5 state-initiated proceeding is ongoing; (2) the proceeding involves important state interests,  
6 including the established interest in regulating physician conduct and licensing; (3) plaintiff is  
7 not barred from litigating federal constitutional issues in the state proceeding and, in fact, judicial  
8 review is provided for in state courts, RCW 18.130.140, and reviewing courts are authorized to  
9 consider constitutional claims, RCW 34.05.570; and (4) the federal action would enjoin the state  
10 proceeding. *Alsager v. Bd. of Osteopathic Med. & Surgery*, 945 F. Supp. 2d 1190, 1195-96  
11 (W.D. Wash. 2013), *aff'd*, No. 13-35210, 2014 U.S. App. LEXIS 9139 (9th Cir. May 16, 2014)  
12 (affirming holding that abstention was required in a case in which a physician filed suit based on  
13 an investigation into his alleged misconduct by the Washington State Board of Osteopathic  
14 Medicine and Surgery); *Clausing v. State*, 90 Wash. App. 863, 870-71, 955 P.2d 394 (1998)  
15 (noting provision for appellate court review pursuant to RCW 34.05.570, including consideration  
16 of constitutional claims, in case addressing license revocation and fine imposed by Washington  
17 State Board of Osteopathic Medicine and Surgery). *See also Buckwalter*, 678 F.3d at 747-48  
18 (affirming abstention and dismissal under *Younger* where suit filed by physician challenged the  
19 suspension of his authority to prescribe medicine by state board of medical examiners).

20       An exception to the general rule of abstention exists if there is a “showing of bad faith,  
21 harassment, or some other extraordinary circumstance that would make abstention  
22 inappropriate[.]” *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435  
23 (1982). Plaintiff’s proposed complaint includes an allegation of bad faith. That is, he appears to

1 argue that the assistant attorney general's service of a response to his motion for reconsideration  
 2 in the underlying administrative proceeding on his attorney and his attorney's failure to promptly  
 3 forward that response to him interfered with his ability to file a notice of appeal. (*See* Dkt. 1 at  
 4 6.) This allegation does not, however, demonstrate the type of extraordinary circumstance that  
 5 justifies the circumvention of a straightforward application of *Younger* in this case. Among  
 6 other issues, it is not clear any delay interfered with the filing of a reply to the motion for  
 7 reconsideration, and the documentation submitted by plaintiff does not support the contention  
 8 that such delay, or any other act or omission, interfered with plaintiff's ability to file an appeal of  
 9 the administrative decision. (*See, e.g.*, Dkt. 1-1 at 21, 33.) Plaintiff's claims should, therefore,  
 10 be dismissed pursuant to *Younger*.<sup>1</sup>

#### CONCLUSION

11 The Court recommends this matter be DISMISSED without prejudice based on the  
 12 *Younger* abstention doctrine. A proposed order accompanies this Report and Recommendation.

#### DEADLINE FOR OBJECTIONS

13 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
 14 served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report  
 15 and Recommendation is signed. Failure to file objections within the specified time may affect  
 16 your right to appeal. Objections should be noted for consideration on the District Judge's

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17       <sup>1</sup> It should be noted that, with the exception of claims seeking prospective injunctive relief against  
 18 individual state officials, the Eleventh Amendment bars plaintiff's claims against the State, its agencies,  
 19 and state officials acting in their official capacities. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974),  
 20 *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989), and *Pennhurst State Sch. & Hosp. v.  
 21 Halderman*, 465 U.S. 89, 100-02 (1984); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952-53 (9th  
 22 Cir. 2008); *Cerrato v. San Francisco Comty. Coll. Dist.*, 26 F.3d 968, 972 (9th Cir. 1994); *Brooks v.  
 23 Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th Cir. 1991); *Alsager*, 945 F. Supp. 2d at  
 1194-95. Because this matter is subject to dismissal under *Younger*, the Court declines to otherwise  
 address other potential bars or limitations on plaintiff's pursuit of relief in this Court.

1 motions calendar for the third Friday after they are filed. Responses to objections may be filed  
2 within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter  
3 will be ready for consideration by the District Judge on **December 2, 2016**.

4 DATED this 4th day of November, 2016.

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7 Mary Alice Theiler  
United States Magistrate Judge

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